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Supreme Court, U.S.
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No. 04-1247

IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

v.

ABU-ALI ABDUR'RAHMAN.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

The federal district court in this habeas case refused to adjudicate several of respondent's prosecutorial misconduct claims on the ground that respondent defaulted them as a matter of state law by not presenting them to the Tennessee Supreme Court in a petition for discretionary review. While this case was on appeal in the federal courts, the Tennessee Supreme Court issued a clarifying rule confirming that the state provides only one tier of post-conviction review. That Rule establishes beyond question that the district court's understanding of state law was erroneous. Respondent promptly moved under Federal Rule of Civil Procedure 60(b) for relief from the district court's judgment. The en banc Sixth Circuit held that respondent's motion – which addressed only the integrity of the habeas proceeding and not the validity of his underlying state conviction – was cognizable under Rule 60.

The petition for certiorari raises two questions:

1. May a federal habeas petitioner ever seek relief under Federal Rule of Civil Procedure 60(b)?

2. In allowing respondent to proceed with his Rule 60(b)(6) motion, did the Sixth Circuit properly defer to the Tennessee Supreme Court's determination that Tennessee maintains a one-tier post-conviction review process?

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Tennessee Supreme Court in order to exhaust state post-conviction remedies. This Court normally defers to sound interpretations of state law by state courts and lower federal courts. See, *e.g.*, *Murdock* v. *City of Memphis*, 87 U.S. 590 (1875) (holding that state courts are the ultimate expositors of state law); *McMillian* v. *Monroe County*, 520 U.S. 781, 786 (1997) (noting that this Court normally follows lower federal-court interpretations of state law). Yet petitioner asks this Court to instruct the State of Tennessee as to the content of its own laws and the structure of its own post-conviction review process, in direct contradiction to the views of the state's own Supreme Court. As this Court observed in *Stronger* v. *Black*, 503 U.S. 222, 235 (1992), "it would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." See also Pet. App. 23a. Nothing in this case warrants such a strange – indeed, perverse – result.

Moreover, this case presents not only a narrow issue of state law, but one that this Court has repeatedly declined to review. Little more than a year ago, this Court denied a petition for certiorari filed by this very petitioner on this issue. *Adams* v. *Holland*, 330 F.3d 398 (CA6 2003), cert. denied, 124 S. Ct. 1654 (2004).[9] In fact, *Adams* was the

[9] Compare *Holland* v. *Adams*, Pet. for Cert., 2003 WL 22926393 (No. 03-821, Nov. 18, 2003) ("Is the decision of the courts of appeals, holding that Tennessee Supreme Court Rule 39 makes a petition for discretionary review to the supreme court unavailable as a state remedy for exhaustion purposes under 28 U.S.C. § 2254, contrary to this Court's decision in *O'Sullivan* v. *Boerckel*, when the rule does not remove such a remedy as an option in Tennessee's established appellate review process?") with Pet. i ("Whether this Court's decision in *O'Sullivan* v. *Boerckel* authorizes a habeas petitioner to obtain relief under Rule 60(b)(6), Fed. R. Civ. P., from a procedural default judgment, on the theory that the state supreme court later adopted a rule that made an application for a discretionary appeal to that court retroactively

second time this Court denied a writ of certiorari on a petition addressing the appropriate construction of a state law establishing requirements for exhaustion of state remedies. See *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999), cert. denied, 529 U.S. 1124 (2000). Nothing has occurred in the interim that would warrant taking up this question now.

A. The Second Question Presented Is of Surpassingly Limited Applicability.

Any determination of the second question presented by petitioner would have such limited impact that it is not worthy of this Court's attention. Due to Rule 60(b)(6)'s strict requirements, the number of Rule 60(b) motions resembling respondent's is likely to be vanishingly small.

1. It is implausible to believe that any additional Rule 60(b) motions can be filed in Tennessee on the basis of TSCR 39. Four years have passed since TSCR 39 unambiguously confirmed that discretionary appeal to the Tennessee State Supreme Court is not – and since 1967 has not been – required to exhaust state remedies for purposes of federal habeas review. Since that time, however, the courts have faced a relative dearth of Rule 60(b)(6) motions attempting to reopen prior federal judgments on the basis of TSCR 39.

Indeed, even to the extent that other capital petitioners may have also already pursued such motions in Tennessee, further attempts to reopen judgments on the basis of TSCR 39 are most likely barred by Rule 60(b)'s stringent time limitations. Under Rule 60(b)(6), all motions must be filed within "a reasonable time." While the precise contours of what constitutes a "reasonable time" will depend on the facts and circumstances of each case, see, *e.g.*, *United States* v. *Holtzman*, 762 F.2d 720, 725 (CA9 1985); *Smith* v. *Sec'y of Health and Human Servs.*, 776 F.2d 1330, 1333 (CA6 1985), courts have strictly interpreted the "reasonable time"

'unavailable' and thus unnecessary for exhaustion of state remedies?").

STATEMENT

Respondent is a death row inmate from Tennessee who punctiliously followed all the state and federal procedural requirements necessary to present his claims that prosecutorial misconduct unconstitutionally tainted his trial. Through no fault of respondent, the federal district court incorrectly construed state law to hold that those claims – which involve pervasive suppression and mischaracterization of evidence – were procedurally defaulted. While respondent's petition for certiorari was pending in this Court, the Tennessee Supreme Court issued a clarifying rule squarely rejecting the district court's construction of Tennessee law. Respondent moved promptly for relief from the district court's judgment. At this point, all that the court of appeals has held is that respondent may use Federal Rule of Civil Procedure 60(b)(6) to file a motion seeking to reopen his habeas proceeding so that a federal court can, for the very first time, actually address these claims on the merits.

1. In July 1987, respondent was convicted in Tennessee state court of first-degree murder, assault with intent to murder, and armed robbery. The jury found three aggravating circumstances – that respondent had prior violent felony convictions; that the murder was especially heinous, atrocious, and cruel; and that the murder was committed during a robbery – and sentenced respondent to death. Respondent's conviction and death sentence were affirmed on direct appeal. *State* v. *Jones*, 789 S.W.2d 545 (Tenn.), cert. denied, 498 U.S. 908 (1990).

The prosecution knowingly used false testimony, other deliberately misleading fabrications, and a calculated strategy of concealment and deceit to get a death sentence.[1]

[1] The details of this prosecutorial misconduct are discussed here only briefly. For a thorough treatment, see Brief of Petitioner 10-23, *Abdur'Rahman* v. *Bell* (No. 01-9094), and the Brief *Amici*

Prosecutor John Zimmerman, who has been the repeated subject of judicial condemnation and censure,[2] knew that to obtain a death sentence from a Nashville jury he would need to show that respondent was the person who actually stabbed the victim. In an internal memorandum, listing the "Weaknesses in the Case," he acknowledged the difficulty of making such a showing since the bulk of the evidence was to the contrary. See Dist. Ct. Exh. 42. Crime scene and autopsy evidence indicated that the victim's stab wounds splattered large amounts of blood about the room. But eyewitnesses stated that Abdur'Rahman wore a full-length coat during the incident, and later examination of this coat found no blood stains whatsoever. Nonetheless, at trial Zimmerman obfuscated and distorted numerous facts to prevent the jury from reaching the same conclusion that he had – that "if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred," *ibid.* In addition, Zimmerman withheld relevant statements from the victim's brother, laboratory reports of cocaine in the victim's blood, and records regarding the victim's bank account. He withheld

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Curiae of Former Prosecutors James F. Neal et al. 7-24, *Abdur'Rahman* v. *Bell* (No. 01-9094).

[2] See, *e.g.*, *State* v. *Middlebrooks*, 995 S.W.2d 550, 558-59 (Tenn. 1999); *Zimmerman* v. *Board of Prof. Resp.*, 764 S.W.2d 757 (Tenn. 1989); *State* v. *Vukelich*, No. M1999-00618-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Sept. 11, 2001); *In re Zimmerman*, 1986 WL 8586 (Tenn. Crim. App. Aug. 7, 1986); *In re Zimmerman*, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002).

Indeed, in this very case, several courts have condemned Zimmerman's action. See, *e.g.*, *State* v. *Jones*, 789 S.W.2d at 552 (describing other actions by Zimmerman in this case as "border[ing] on deception"); Pet. App. 92a-94a (district court finding, with respect to one of the few prosecutorial misconduct claims on which it reached the merits, that Zimmerman suppressed exculpatory evidence regarding the circumstances of respondent's prior felony conviction).

and misrepresented information regarding Abdur'Rahman's mental state and his 1972 murder conviction. Finally, Zimmerman made material misrepresentations to the jury, regarding information he knew to be untrue, in his closing argument. Zimmerman's conduct was so egregious that several prominent former prosecutors filed an *amicus* brief in support of Abdur'Rahman when his case was before this Court in 2002. See *supra* note 1.

2. Respondent first pursued his claims of prosecutorial misconduct, along with a number of other claims not relevant to this petition, through the Tennessee post-conviction process. After the trial court rejected his claims, he timely appealed as of right to the Tennessee Court of Criminal Appeals, preserving in his briefs all claims regarding prosecutorial misconduct. That court affirmed the trial court's decision. *Jones* v. *State*, CCA No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140 (Tenn. Crim. App. Feb. 23, 1995).

Tennessee law provides for appeals by permission to the Tennessee Supreme Court in limited circumstances. See Tenn. R. App. P. 11(a).[3] In compliance with Tennessee law, respondent sought further state court review of those claims which fell within the narrow dictates of Rule 11(a), but did not seek review of claims, including certain claims of prosecutorial misconduct, that could not satisfy the rule's strictures because they involved application of well-established constitutional law. The Tennessee Supreme Court denied respondent leave to appeal. *Jones* v. *State*, No. 01C01-9402-CR-00079 (Tenn., filed Aug. 28, 1995), cert. denied, 516 U.S. 1122 (1996).

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[3] These circumstances include: "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." Tenn. R. App. P. 11(a).

3. Having fully exhausted his state-court remedies, respondent next presented his federal constitutional claims in a federal application for a writ of habeas corpus. See Pet. App. 62a-128a. Although the district court vacated respondent's death sentence on the ground of ineffective assistance of counsel, it declined to consider most of his prosecutorial misconduct claims as an alternative or additional ground for sentencing relief. *Ibid.* The district court found these claims to be procedurally barred because respondent had not sought leave to appeal to the Tennessee Supreme Court, reasoning that "a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement." *Id.* 71a.

While respondent's case was on appeal, this Court issued its decision in *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), holding that unless such review is "unavailable," a state prisoner will be deemed to have exhausted his remedies only when he has filed a petition for discretionary review in the state court of last resort. A short time later, the Sixth Circuit sua sponte reversed the district court's findings of prejudice due to ineffective assistance of counsel, reinstated the death sentence, and rejected all of respondent's other claims. *Abdur'Rahman* v. *Bell*, 226 F.3d 696 (CA6 2000).

Respondent sought this Court's review. On June 28, 2001, while his petition for certiorari was pending, the Tennessee Supreme Court adopted Tennessee Supreme Court Rule 39 ("TSCR 39"), which the court itself specified as "clarify[ing]" the state of the law that had existed since 1967, when the Tennessee General Assembly had created the Tennessee Court of Criminal Appeals "to reduce the appellate backlog in criminal cases." Pet. App. 60a.

TSCR 39 – which was adopted in direct response to *O'Sullivan*, see Tenn. R. App. P. 11 Advisory Comm'n Comment – provides in pertinent part that:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967,

> a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all state remedies available for that claim.

See Pet. App. 61a.

The Tennessee Supreme Court's action confirmed that respondent had exhausted all his claims by presenting them to the Court of Criminal Appeals, and that he had not been required to present them to the Tennessee Supreme Court as well. TSCR 39 unambiguously established that the district court simply erred in holding that respondent's prosecutorial misconduct claims were procedurally defaulted.

In October 2001, this Court denied certiorari in respondent's case. *Abdur'Rahman* v. *Bell*, 534 U.S. 970 (2001). Less than forty-eight hours later, with the case no longer on appeal, respondent advised the district court that he would file a motion for relief under Federal Rule of Civil Procedure 60(b), on the ground that, in light of TSCR 39, his prosecutorial misconduct claims should have been considered on the merits. He filed the motion less than one month later, before the Sixth Circuit had even issued its mandate in the case, which previously had been stayed.[4]

The district court responded that it could not consider respondent's motion because, under existing Sixth Circuit

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[4] There is no dispute that the district court nonetheless had jurisdiction to consider the motion. A party may seek relief in the district court under Rule 60(b) while a case is pending on appeal. See *First Nat'l Bank of Salem* v. *Hirsch*, 535 F.2d 343, 346 (CA6 1976).

precedent, a "Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive [habeas] petition," which is prohibited by the Antiterrorism and Effective Death Penalty Act ("AEDPA") except in narrow circumstances that are not present in this case. *Abdur'Rahman* v. *Bell*, No. 3:96-0380, 2001 WL 1782874, at *1 (M.D. Tenn. Nov. 27, 2001). See also Pet. App. 48a (subsequently rejecting Rule 60(b) relief and entering a final, appealable judgment on the same ground).[5]

The Sixth Circuit initially held that Rule 60(b) motions are categorically barred under AEDPA, Pet. App. 6a, but reversed itself upon rehearing en banc, *id.* 8a. The Sixth Circuit adopted the approach taken by the overwhelming majority of circuits, under which Rule 60(b) applies in cases in which "the factual predicate in support of the motion attacks the manner in which the earlier habeas judgment was procured and is based on one or more of the grounds enumerated" in the Rule, but not in cases in which "the factual predicate in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction." *Id.* 3a. Applying that "functional approach," *id.* 2a, to respondent's case, the Sixth Circuit held that respondent's Rule 60(b) motion was permissible because it "relat[ed] to the integrity of the federal habeas judgment – and specifically, the basis for the district judge's procedural

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[5] The Sixth Circuit initially agreed with the district court, *Abdur'Rahman* v. *Bell*, 226 F.3d 696 (CA6 2000), and this Court granted certiorari to decide in what circumstances Rule 60(b) applies on habeas, *Abdur'Rahman* v. *Bell*, 535 U.S. 1016 (2002). The Court subsequently dismissed the writ, apparently on the ground that the district court's judgment in the case was not final. *Abdur'Rahman* v. *Bell*, 537 U.S. 88 (2002) (Stevens, J., dissenting). Respondent then refiled his Rule 60(b) motion in the district court and secured a final judgment. Pet. App. 48a. The discussion in the text of further Sixth Circuit proceedings relates to that court's review of the district court's final judgment.

default ruling" – and not to the constitutionality of the state-court proceedings, *id.* 13a. The district judge's ruling rested on a "defective foundation," *id.* 19a, and amounted to "extraordinary circumstances" justifying Rule 60(b) relief, *id.* 21a. Accordingly, the en banc court reversed the judgment of the district court and remanded the case for consideration of respondent's Rule 60(b) motion. *Id.* 24a.

SUMMARY OF THE ARGUMENT

Neither of the questions presented by the state warrants this Court's review. To be sure, petitioner's first question regarding the availability of Federal Rule of Civil Procedure 60(b) in habeas proceedings echoes the legal issue presented by *Gonzalez* v. *Crosby* (No. 04-6432) (cert. granted, Jan. 14, 2005). But regardless of the outcome in that case, which will no doubt clarify the circumstances under which Rule 60(b) relief is available, respondent's particular claim falls within the scope of the Rule. Moreover, given the procedural posture of this case – in which no court has yet ruled on respondent's Rule 60(b)(6) motion – review by this Court would be premature. Thus, petitioner's first question presented does not even warrant holding this petition pending the decision in *Gonzalez*.

Petitioner's second question presented is even less worthy of review. It involves an extremely narrow issue of state law – namely, whether the clarification of Tennessee's existing law worked by the promulgation of Tennessee Supreme Court Rule 39 authorizes reopening a habeas judgment that misconstrued the state's exhaustion requirement. Moreover, barely a year ago, this Court denied a petition for certiorari filed by this very petitioner regarding the proper interpretation of Rule 39. *Adams* v. *Holland*, 330 F.3d 398 (CA6 2003), cert. denied, 124 S. Ct. 1654 (2004) (No. 03-821); see also *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999) (per curiam), cert. denied, 529 U.S. 1124 (2000) (No. 99-1470) (presenting question whether post-conviction review in Arizona Supreme Court is "unavailable" within the

meaning of *O'Sullivan* in cases governed by that court's announcement that, for federal habeas purposes, discretionary review need not be sought to exhaust state remedies). Nothing about this petition warrants a different result.

In any event, the Sixth Circuit's decision is entirely consistent with this Court's holding in *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), which expressly recognized the states' ability to structure their own post-conviction review procedures and to determine what constitutes exhaustion of state remedies. Through TSCR 39, Tennessee has unambiguously stated that it considers one post-conviction appeal sufficient for the exhaustion of state remedies prior to federal habeas review. The Sixth Circuit's vindication of Tennessee's ability to structure its state remedies fully respects the principles of comity that animate *O'Sullivan* and this Court's exhaustion doctrine more generally.

ARGUMENT

I. THE QUESTION WHETHER RESPONDENT CAN PURSUE HIS RULE 60(B) MOTION DOES NOT WARRANT THIS COURT'S REVIEW.

A. Petitioner Has Provided No Reason for Granting Interlocutory Review in This Case.

This case is in an essentially interlocutory posture. At this point, all that the Sixth Circuit has decided is that respondent has the right to have his Rule 60(b) motion decided. See Pet. App. 24a (remanding the case to the district court "to consider whether the [Rule 60(b)] motion should be granted"). There is no final judgment in the district court.[6]

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[6] In fact, even an initial procedural decision regarding whether a plaintiff may proceed with his underlying claim that is far more outcome-determinative than the Sixth Circuit's ruling in this case does not constitute a final judgment for purposes of appeal. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476-77 (1978) (denying an interlocutory appeal even though denial of class certification effectively constitutes a "deathknell" that may "induce a party to abandon his claim before final judgment").

This fact squarely distinguishes respondent's situation from *Gonzalez* v. *Crosby* (No. 04-6432, cert. granted, Jan. 14, 2005), on which petitioner wrongly seeks to piggyback. See Pet. 8. In *Gonzalez*, there was a final judgment dismissing Gonzalez's Rule 60(b) motion in the district court and that judgment was affirmed by the Eleventh Circuit on appeal. Thus, proceedings in the lower courts were entirely complete when Gonzalez sought review from this Court.

The lack of finality in decisions by courts of appeals to remand cases for further proceedings "of itself alone" can provide "sufficient ground for the denial of" a petition for certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [for further proceedings and it is therefore] not yet ripe for review by this Court").

To be sure, this Court has recognized that it has the jurisdiction to review an interlocutory ruling by a court of appeals when it is "necessary to prevent extraordinary inconvenience." *American Construction Co.* v. *Jacksonville T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). Petitioner has failed entirely, however, to identify any reason why this Court's intervention is essential *right now*, because there is none. In fact, the district court has not even begun proceedings on petitioner's Rule 60(b) motion. Thus, if this Court's decision in *Gonzalez* were to bear upon how respondent's Rule 60(b) motion should be handled, the district court would be eminently capable of applying whatever rule this Court adopts. It is accordingly unnecessary to hold this case pending the disposition of *Gonzalez*.

B. Because Respondent's Rule 60(b) Motion Satisfies Each of the Interpretations of Rule 60(b) That Has Been Advanced in *Gonzalez*, Certiorari Should Be Denied.

This Court's forthcoming decision in *Gonzalez* v. *Crosby* will clarify the circumstances under which a habeas petitioner may seek relief under Rule 60(b) given the restrictions on second or successive petitions set forth in AEDPA. 28 U.S.C. 2244(b). There is, however, already universal agreement among the lower courts and among the parties and *amici* in *Gonzalez* that at least *some* Rule 60(b) motions satisfy AEDPA. Should the Court adopt any of the approaches advocated in *Gonzalez*, respondent's Rule 60(b) motion would be cognizable. There accordingly is no need to hold this case pending the Court's ruling in *Gonzalez*.

1. The Second Circuit's *Rodriguez* Approach. In *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001), the Second Circuit held that Rule 60(b) motions that otherwise comport with the Rule are never second or successive petitions under AEDPA. *Id.* at 198 ("We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)."). As a result, should this Court choose to follow the Second Circuit's approach in *Rodriguez*, respondent's Rule 60(b) motion would undeniably be cognizable, because petitioner has identified no Rule-60-based inadequacies in his motion.

2. The "Functional Approach." The overwhelming majority of the circuits that have addressed the question have permitted Rule 60(b) motions in habeas proceedings in which the movant is challenging a defect in the habeas proceeding, rather than the constitutionality of his underlying conviction. See Pet. App. 2a-3a (en banc Sixth Circuit in respondent's case); see also, *e.g.*, *Rodwell* v. *Pepe*, 324 F.3d 66, 70 (CA1 2003), cert. denied, 540 U.S. 873 (2003); *Pridgen* v. *Shannon*, 380 F.3d 721, 725 (CA3 2004), cert. denied, 125 S. Ct. 1298

(2005); *Reid* v. *Angelone*, 369 F.3d 363, 375 (CA4 2004); *Dunlap* v. *Litscher*, 301 F.3d 873, 875-76 (CA7 2002); *Hamilton* v. *Newland*, 374 F.3d 822, 823 (CA9 2004), cert. denied, 125 S. Ct. 1599 (2005). The Sixth Circuit has already held that respondent's motion satisfies the functional approach. See Pet. App. 13a-23a. Respondent does not seek to "relitigate the merits of his prosecutorial misconduct claim, but rather asks the district court to reconsider its judgment, which was based on a defective foundation." *Id.* 19a. Thus, if this Court adopts the prevailing analysis in the courts of appeals, it should deny certiorari in this case, which presents a straightforward application of that analysis.

3. The Approach of the United States. In its *amicus* brief in *Gonzalez*, the United States recognizes that relief from a judgment should be available in habeas cases "when the Rule 60(b) motion exposes a substantial defect in the court's processes that goes to the integrity, fundamental reliability, and rudimentary fairness of the procedures by which [a petitioner's] first application was adjudicated." Br. of United States 16, *Gonzalez* v. *Crosby* (No. 04-6432). While the United States then advances an unacceptably cramped construction of that principle, under which even egregious errors, such as the one that occurred in respondent's case, would be immune to correction, see *id.* 21 n.9, any reasonable application of the United States's proposed standard should encompass claims such as respondent's.

First, the district court's legal error in this case surely constituted a "substantial defect in the court's processes" – namely, a completely unjustified and unjustifiable failure to address the merits of respondent's properly preserved federal claims. That error goes to the heart of the integrity of the habeas process. The core of due process lies in "the right to notice and an opportunity to be heard [which] must be granted at a meaningful time and in a meaningful manner." *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2649 (2004) (internal quotation marks omitted). If, as the United States concedes, a court's failure to serve a habeas petitioner with notice at a critical

stage of the habeas proceedings constitutes a valid ground for a Rule 60(b) motion, see U.S. Br. 25-26, then so too does a court's complete failure to accord a habeas petitioner any opportunity to be heard on the merits of his properly preserved claim.

Second, the district court's error also denied respondent "rudimentary fairness." Rudimentary fairness surely requires that before a state is permitted to put an inmate to death, he be permitted to seek federal habeas review of all properly preserved and presented constitutional claims. Whatever else may qualify as an "exceptional defect in the federal court's adjudicatory processes," the manifest error of the district court surely does. The defect is "exceptional" with respect to both its gravity and its rarity. The scenario that prompted respondent's Rule 60 motion – the decision by a state supreme court that a clarifying rule was necessary to correct federal courts' misapplication of state procedural rules – is hardly "so frequently recurring as to threaten, in practice, to circumvent AEDPA's constraints on federal review of criminal convictions." U.S. Br. 9. To the contrary, respondent submits that such an error is rare indeed, and that when it occurs, Rule 60(b) provides a necessary safety valve.

4. The Eleventh Circuit's Approach. Even if this Court were to adopt the restrictive approach endorsed by the Eleventh Circuit – which even the United States finds "unduly narrow," *id.* at 24[7] – respondent's Rule 60(b) motion would be cognizable. In *Gonzalez*, the Eleventh Circuit held that Rule 60(b) motions should be permitted when they allege clerical error or fraud on the court. 366 F.3d 1253, 1278 (2004). The gravamen of these two grounds for reopening a final judgment is rooted in the state's interest in ensuring "the very legitimacy of the judgment." *Ibid.* (citing *Calderon* v.

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[7] Respondent has also explained why the Eleventh Circuit's rule is unjustifiable in his *amicus* brief in *Gonzalez*. See Brief of *Amicus Curiae* Abu-Ali Abdur'Rahman in Support of Petitioner 16-17, 19-20, *Gonzalez* v. *Crosby*, No. 04-6432.

Thompson, 523 U.S. 538, 557 (1998)). Allowing an exception for fraud and clerical error acknowledges that the legitimacy of a judgment is undercut when a defect in a habeas proceeding lies outside the power of a habeas petitioner to control or avoid.

That is also the situation in respondent's case. There was nothing he could have done to prevent the district court from erroneously dismissing his prosecutorial misconduct claims. Indeed, respondent is the victim of a cruel irony. Although the district court erroneously dismissed his claims of prosecutorial misconduct for failure to exhaust, it granted his habeas petition on grounds of ineffective assistance of counsel. However, in addressing petitioner's appeal (which challenged only the district court's decision to hold an evidentiary hearing), the Sixth Circuit then sua sponte reversed the district court's finding of ineffective assistance and vacated the writ. Rule 60(b) thus creates an entirely necessary and appropriate vehicle for curing a fundamental defect in his habeas proceeding.[8]

II. THE QUESTION WHETHER RESPONDENT EXHAUSTED HIS STATE-COURT REMEDIES DEPENDS ENTIRELY ON THE CONSTRUCTION OF TWO TENNESSEE STATE COURT RULES AND IS OF SUCH LIMITED IMPORTANCE THAT IT DOES NOT MERIT THIS COURT'S REVIEW.

Petitioner's second question presented asks this Court to reverse the authoritative interpretation of Tennessee state law offered by the Tennessee Supreme Court and faithfully applied by the Sixth Circuit. Both courts have held that a state prisoner need not seek discretionary review by the

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[8] Moreover, any appeal by respondent of the procedural default ruling would have been futile because the district court's default ruling relied upon longstanding Sixth Circuit precedent, which was reinforced during the appeal by this Court's ruling in *O'Sullivan* v. *Boerckel* and not corrected by TSCR 39 until after the appeal.

requirement to preclude claims filed as little as eleven months after an intervening development.[10] Any habeas petitioner who was to file a Rule 60(b)(6) motion today – and Rule 60(b)(1), (b)(2), and (b)(3) motions would all be time-barred by the text of the Rule itself – would thus face the virtually impossible task of meeting Rule 60(b)(6)'s "reasonable time" requirement. If it is not yet completely closed, the window of opportunity for filing Rule 60(b) motions is surely closing fast.

Respondent, of course, met Rule 60(b)'s "reasonable time" requirement by acting swiftly after TSCR 39 was announced. Less than forty-eight hours after this Court denied respondent's first petition for certiorari, he secured a status conference and advised the district court of his intention to file a Rule 60(b) motion to address the impact of TSCR 39 on his prosecutorial misconduct claims. Respondent's Rule 60(b)(6) motion was filed less than one month later, a mere four months after TSCR 39 was published. Even that slight day owed solely to the fact that the case was pending in this Court in the interim. The Sixth Circuit correctly determined that respondent's timely actions satisfied Rule 60(b)(6)'s "reasonable time" requirement. Pet. App. 20a. But precisely because respondent acted with such dispatch, any future movants will face a heavy burden in convincing a court that they have acted reasonably in delaying so long to file their motion. The remote possibility that some further Rule 60(b)(6) claimant may someday

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[10] For examples of cases in which courts have rejected Rule 60(b)(6) motions as untimely, see, *e.g.*, *Nat'l Org. for Women* v. *Operation Rescue*, 47 F.3d 667, 669 (CA4 1995) (motion filed more than one year after intervening legal decision that was the basis for motion); *Truskoski* v. *ESPN*, 60 F.3d 74, 77 (CA2 1995) (motion filed almost one year after grounds for motion became apparent); *Fed. Land Bank of St. Louis* v. *Cupples Bros.*, 889 F.2d 764, 766-67 (CA8 1989) (unexplained year-long delay in filing after change in statutory law on which motion was based).

emerge from the woodwork hardly justifies this Court's review.

2. Nor is it likely that any ruling in this case would affect habeas petitioners in other jurisdictions. Only a handful of other states have promulgated rules similar to TSCR 39, and the laws in those states have generally been in place for several years.[11] Like TSCR 39, these rules have produced few, if any, Rule 60(b)(6) motions.[12] Only a single state rule from Missouri has been interpreted by a federal court as having any application to judgments issued prior to the rule's effective date because, like TSCR 39, it clarified rather than changed pre-existing state law. *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002). Because the Missouri rule was issued on October 23, 2001, future Rule 60(b)(6) movants in that state are in the same position as future movants in Tennessee: they are extremely unlikely to satisfy Rule 60(b)'s timeliness requirement.

3. In any event, very few habeas petitioners can satisfy Rule 60(b)(6)'s standard for reopening a judgment, and the district courts are eminently capable of policing that standard

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[11] Our research uncovered similar rules in only seven states: Arizona, Arkansas, Georgia, Kentucky, Missouri, Pennsylvania, and South Carolina. See *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999), cert. denied, 529 U.S. 1124 (2000) (citing *State* v. *Sandon*, 777 P.2d 220 (Ariz. 1989)); Ky. R. Crim. P. 12.05 (effective Jan. 1, 2005); Mo. Sup. Ct. R. 83.04 (effective July 1, 2002); Ark. R. Sup. Ct. & Ct. App. 1-2(h) (effective Feb. 15, 2001); Georgia Supreme Court Order of Nov. 16, 2004 (amending Ga. Sup. Ct. R. 40); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam); *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563 (1990) (South Carolina).

[12] A Westlaw and Lexis search of published and unpublished state and federal court opinions containing "60(b)" and a citation to the state rules did not return *any* examples of Rule 60(b) motions on those grounds.

in light of the guidance this Court has already provided. In *Liljeberg* v. *Health Services Acquisition Corp.*, this Court directed that Rule 60(b)(6) "should only be applied in 'extraordinary circumstances.'" 486 U.S. 847, 863-64 (1988) (quoting *Ackermann* v. *United States*, 340 U.S. 193, 199 (1950)). Thus, this Court has used Rule 60(b)(6) only in unusual cases in which it is necessary to prevent manifest injustice. See, *e.g.*, *id.* at 864 (movant could not have uncovered judge's conflict of interest until after final judgment); *Klapprott* v. *United States*, 335 U.S. 601, 613 (1949) (party who was poor, sick, and imprisoned at time of denaturalization proceedings showed "extraordinary situation" justifying Rule 60(b)(6) relief). Because such compelling circumstances are rarely present, the "extraordinary circumstances" requirement severely restricts the already *de minimis* universe of potential Rule 60(b)(6) claims that could be affected by the outcome of this case.

Respondent's situation epitomizes the unusual circumstances necessary to secure relief under Rule 60(b)(6): he was sentenced to death after a truly outrageous course of prosecutorial misconduct involving outright lies and suppression of vital evidence and was then denied, through no fault of his own and on the basis of a fundamental error of law, any opportunity to seek federal review. Abdur'Rahman diligently pursued every available state remedy in punctilious obedience to Tennessee law. Yet, without Rule 60(b)(6), his prosecutorial misconduct claims will not be heard due to a combination of judicial error and unfortunate timing that was wholly outside his control. As the Sixth Circuit recognized, the district court's fundamental misunderstanding of Tennessee's post-conviction remedies, which resulted in the erroneous denial of respondent's one chance to have his prosecutorial misconduct claims heard in federal court, amounts to the type of "extraordinary circumstances" that justify Rule 60(b)(6) relief. Pet. App. 23a ("[T]he district court's presumption about Tennessee's procedural rules is the factor that renders the promulgation of TSCR 39 an

'extraordinary circumstance,' permitting possible relief pursuant to Rule 60(b)(6).").

B. The Sixth Circuit's Ruling in This Case Is Entirely Consistent with the Holding and Underlying Rationale of This Court's Decision in *O'Sullivan* v. *Boerckel* and With the Decisions of Every Other Court of Appeals to Have Addressed This Issue.

Petitioner's second question presented is premised on a fundamental misunderstanding not only of the holding of *O'Sullivan* v. *Boerckel* but also its underlying rationale. Contrary to petitioner's argument, the Sixth Circuit's decision in this case comports fully with *O'Sullivan*.

In *O'Sullivan*, this Court addressed the question whether habeas petitioners in Illinois were required to seek discretionary review by the Illinois Supreme Court in order to exhaust their state-court remedies. Because Illinois had chosen a two-tier system of appellate review, this Court held that discretionary review by the Illinois Supreme Court was a "normal, simple, and established part of the State's appellate review process." *O'Sullivan*, 526 U.S. at 845. Thus, to ensure that Illinois state courts received a "full and fair opportunity to resolve federal constitutional claims," the Court held that prisoners were required to respect Illinois's two-tier system by petitioning to the state Supreme Court in order to exhaust state remedies. *Ibid.*

O'Sullivan contrasted Illinois's two-tier system with South Carolina's one-tier system. South Carolina had removed Supreme Court review from the state's normal, established appellate process by providing that "a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error." *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563 (1990); see *O'Sullivan*, 526 U.S. at 847. In his

concurrence, Justice Souter made explicit what the Court's comparison implicitly suggested: in a state with a system like South Carolina's, a prisoner need not seek discretionary review to exhaust his claims. *O'Sullivan* at 850; see also *id.* at 864 (Breyer, J., dissenting) ("a federal habeas court should respect a State's desire that prisoners not file petitions for discretionary review, where the State has expressed the desire clearly").

O'Sullivan's treatment of both Illinois's and South Carolina's post-conviction systems is based on principles of comity. Respect for the power of states to design their own judicial systems requires deference to a state's determination of the scope of its own post-conviction remedies. By drawing a contrast between Illinois's two-tier post-conviction system and South Carolina's one-tier system, *O'Sullivan* recognized that different states treat discretionary review differently for purposes of exhaustion. In express response to *O'Sullivan*, the Supreme Court of Tennessee promulgated TSCR 39 to make clear that Tennessee falls in the same camp as South Carolina: in all post-conviction relief proceedings "from or after July 1, 1967," Pet. App. 61a – i.e., including at the time respondent was pursuing state post-conviction review – Tennessee law has not required a state prisoner to seek review from the state supreme court in order to exhaust state remedies.

In light of the comity interests underlying *O'Sullivan*, every circuit that has reviewed rules like TSCR 39 has agreed that such rules effectively eliminate discretionary state supreme court review as a prerequisite for federal habeas relief. *Adams* v. *Holland*, 330 F.3d 398, 403 (CA6 2003), cert. denied, 541 U.S. 956 (2004); Pet. App. 1a (en banc Sixth Circuit in respondent's case); *Lambert* v. *Blackwell*, 387 F.3d 210 (CA3 2004); *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002); *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999), cert. denied, 529 U.S. 1124 (2000). In stark contrast, petitioner's argument would undermine the very principles of comity that have always served as the foundation of the exhaustion

doctrine. See *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989) (explaining that the exhaustion requirement is grounded in principles of comity and reflects a desire to protect the state courts' role in the enforcement of federal law). Indeed, it is hard to imagine a proposition more offensive to comity than forcing the Tennessee Supreme Court to spend time processing and analyzing routine habeas petitions that it has unequivocally disclaimed any interest in hearing. See Pet. App. 23a.

The circuit court decisions that have uniformly deferred to each state's own determination of what is required to fully exhaust its processes rely upon the commonsense proposition that if a state's own procedures define an issue as final for state law purposes, then comity is served only if federal courts honor the state's pronouncement. If the state is satisfied that it has received a "full and fair opportunity" for review even without petition to the state supreme court, then federal review shows no disrespect for the state's process. Kirk J. Henderson, *Thanks, but No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement*, 51 Case W. Res. L. Rev. 201, 231 (2000). By contrast, forcing a state supreme court to entertain unwanted petitions, even after the state has expressly stated that one-tier review is sufficient, disserves comity principles and creates unnecessary friction between federal and state courts. Under petitioner's perverse interpretation of comity, Tennessee would be faced with the unappealing choice of either eliminating discretionary review of all habeas petitions (or perhaps discretionary review *in toto*), or facing a slew of habeas petitions resting on settled legal principles. By disrespecting the avowed interests of the state of Tennessee, disrupting the state's established appellate review process, and compelling the Tennessee Supreme Court to reject *all* habeas petitions in order to steer clear of the routine petitions it wants to avoid, petitioner's argument would seriously undermine the comity interests that *O'Sullivan* was intended to promote.

C. Petitioner's Argument that Discretionary Review Was Nevertheless "Available" Relies on a Hypertechnical and Erroneous Meaning of that Term.

Petitioner wrongly contends that Tennessee Supreme Court review was "available" for exhaustion purposes simply because it was literally possible to petition for review, even though TSCR 39 expressly states that such review is not required for exhaustion purposes and a petition raising the claims respondent is now advancing would not comport with Tennessee Rule of Appellate Procedure 11. This argument "fails to grasp the meaning of the word 'available' as it is used in *O'Sullivan*, and instead dwells upon a hypertechnical interpretation of that term." *Adams* v. *Holland*, 330 F.3d 398, 402 (CA6 2003), cert. denied, 541 U.S. 956 (2004); see also Pet. 13.[13] Moreover, it is flatly inconsistent with the 2002 Advisory Commission Comment to Tennessee Rule of Appellate Procedure 11, which expressly provides that, pursuant to TSCR 39, "an appellant in a criminal case will be deemed to have exhausted all *available* state remedies respecting a claim of error following an adverse decision by the Court of Criminal Appeals without the necessity of filing a petition to rehear or an application for permission to appeal under Tenn. R. App. P. 11(a)" (emphasis added). Finally, it has been unanimously rejected by every court of appeals that has considered this issue. See cases discussed *supra* at 20 and *infra* at 24.

O'Sullivan recognized that the term "available" has never been interpreted literally in the habeas context. 526 U.S. at 844. Although 28 U.S.C. 2254(c) requires an applicant to

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[13] This Court has frowned on hypertechnical interpretations of the term "available." See, *e.g.*, *Hiatt* v. *Brown*, 339 U.S. 103, 108 (1950) (rejecting literal interpretation of Article of War requiring that an officer of the Judge Advocate General's Department be detailed as a law member of a general court-martial unless one was not "available").

exhaust the remedies available in state courts, it does not require a state prisoner "to invoke *any possible* avenue of state court review" because the Court "[has] never interpreted the exhaustion requirement in such a restrictive fashion." *Ibid.* This Court has repeatedly noted that, even though certain procedures are technically possible, they are "unavailable" for exhaustion purposes unless they are part of the normal and simple appellate process. *Ibid.* (citing *Wilwording* v. *Swenson*, 494 U.S. 249, 249-50 (1971) (per curiam) (holding that doctrine of exhaustion does not require state prisoners to file repetitious applications in state courts)); *Brown* v. *Allen*, 344 U.S. 443, 447 (1953) (holding that a prisoner does not have "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review").

In *O'Sullivan*, this Court stated that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." 526 U.S. at 847-48. For purposes of exhaustion, a state can render post-conviction remedies unavailable by declaring that "those remedies are alternatives to the standard review process." *Id.* at 844. Thus, the Sixth Circuit has correctly held that "when remedies are taken outside of the normal criminal review process, those remedies become 'extraordinary': technically available to the litigant but not required to be exhausted." *Adams*, 330 F.3d at 403.

Petitioner concedes, as he must, that a state court is free to determine what is or is not contained within its standard review process. Pet. 16. But he seeks to sidestep that concession by relying on linguistic legerdemain, claiming that although TSCR 39 places discretionary review outside the normal, established post-conviction review process, discretionary review is somehow nonetheless "available" in all habeas cases and must be sought. Petitioner's interpretation would eviscerate TSCR 39 and undermine the expressed wishes of the Tennessee Supreme Court.

Petitioner's position is also contrary to the uniform approach taken by the courts of appeals. In every circuit that has addressed a rule like TSCR 39, the court has found that such a rule "serves to remove review of criminal and collateral appeals from the 'normal' and 'established' appellate review procedure," thereby rendering it "unavailable." *Lambert*, 387 F.3d at 233; see also *Swoopes*, 196 F.3d at 1011 ("The import of *O'Sullivan* is that exhaustion is not required when a state declares which remedies are 'available' for exhaustion. Arizona has done so."); *Randolph* v. *Kemna*, 276 F.3d 401, 404 (CA8 2002) (stating that Missouri's rule constitutes an unequivocal statement that "one complete round of [Missouri's] established review process" stops at the intermediate appellate level).

By unequivocally announcing that the state has had a full and fair opportunity to resolve federal constitutional claims if they are presented to the Court of Criminal Appeals – as respondent's claims concededly were – Tennessee has rendered state supreme court review "unavailable."

D. Petitioner's Claim that Respondent Is Seeking the Retroactive Application of New Law Regarding Exhaustion Is Entirely Meritless.

Petitioner's final assertion is that TSCR 39 is a change in law with retroactive application and thus cannot be applied to respondent's case without overruling *O'Sullivan*. That assertion contradicts the authoritative determination of both the Tennessee Supreme Court and the Sixth Circuit that the rule is merely a clarification of pre-existing state law. In any case, it involves a narrow question of state law that hardly merits this Court's review.

The Tennessee Supreme Court and the Sixth Circuit agree that TSCR 39 clarified – and did not change – Tennessee law as it has existed since July 1, 1967. *Adams*, 330 F.3d at 405. In its order promulgating TSCR 39, the Tennessee Supreme Court explicitly noted that it was

clarifying rather than changing existing law. Pet. App. 60a. If any room was left for doubt, the rule's accompanying advisory commission comments explain that TSCR 39 "works no change to" state rules governing appeal to the Tennessee Supreme Court. Tenn. R. App. P. 11 Advisory Commission Comment (2002). When the Tennessee Supreme Court decides to change a rule and to alter the law, it knows full well how to do so. For example, on October 1, 2004, the Tennessee Supreme Court promulgated a new Rule 19, regarding pro hac vice appearances by lawyers not licensed to practice law in Tennessee, which became effective on its date of issuance and applied strictly "*prospectively* from that date." *In re: Amendment to Rule 19, Rules of the Tennessee Supreme Court* (Tenn. Oct. 1, 2004) (emphasis added).

In contrast, petitioner points to absolutely no authority for his assertion that TSCR 39 worked a change in Tennessee law. In lieu of citing relevant Tennessee authority, petitioner relies solely on language from a Third Circuit case interpreting a Pennsylvania rule that is sharply distinguishable from the rule at issue in this case. Pet. 15 (citing *Wenger* v. *Frank*, 266 F.3d 218 (CA3 2001)). The Third Circuit in *Wenger* examined the language of Pennsylvania Order No. 218 and determined that it would not apply retroactively because it contained "forward-looking" and "prospective" language absent from TSCR 39. 266 F.3d at 225 (analyzing the Order's language beginning with the phrase "*AND NOW*, this 9th day of May, 2000, we *hereby* recognize * * * ") (emphasis added). Unlike Pennsylvania Order No. 218, TSCR 39 expressly states that it clarifies pre-existing state law. Therefore, *Wenger* is wholly inapposite.

Put simply, when a case involves mere clarification of the law, it presents no issue of retroactivity. *Fiore* v. *White*, 531 U.S. 225, 228 (2001). Furthermore, "[a] federal court will normally defer to a state court's decision about retroactivity of state decisions." *Lambert* v. *Blackwell*, 387 F.3d 210, 240 (CA3 2004) (citing *Fiore* v. *White*, 531 U.S. 225 (2001)).

Before this Court proceeded to issue a judgment in *Fiore*, it certified to the Pennsylvania Supreme Court the question whether an interpretation of law constituted a new rule of law or a mere clarification of existing law. *Fiore*, 531 U.S. at 228. In this case, the Tennessee Supreme Court has already answered that question and has made plain that TSCR 39 is merely a clarification of the law; consequently, petitioner is flatly wrong when he claims that TSCR 39 operates retroactively when it is applied to respondent.

Petitioner's retroactivity argument boils down to the contention that federal courts should refuse to respect TSCR 39 as a valid clarification of existing state law. Once again, petitioner is asking this Court to defy the comity principles that underlie *O'Sullivan*. The Sixth Circuit has already articulated the proper response to this anti-comity argument: federal courts ought to "respect[] Tennessee's law on the subject of what constitutes available remedies within its own state * * *, especially here, where Rule 39 clarifies existing law rather than changing the law." *Adams*, 330 F.3d at 405.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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